CORINNE MAE HOWELL

AND HER MINOR CHILDREN

GARY ARNOLD HOWELL, RICHARD DEWAYNE HOWELL,

AND DARCY LYNN HOWELL

v.

UNITED STATES

IBIA 80-30-DE, 80-31-DE, 80-32-DE, 80-33-DE

Decided June 11, 1981

Appeal from order by Administrative Judge John R. Rampton in Alaska Native Disenrollment contest requiring the Bureau of Indian Affairs to disenroll appellants from the roll of beneficiaries of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977).

Affirmed.

1. Indian Tribes: Alaskan Groups--Alaska Native Claims Settlement Act: Disenrollment: Metlakatla Natives

The provisions of the Alaska Native Claims Settlement Act specifically

exclude members of the Metlakatla Tribe of the Annette Islands Reserve from benefits under the Act. Where appellant and her children periodically resided at Metlakatla, accepted benefits from the Metlakatla Tribe as tribal members, were enrolled members since 1968, and did not initiate efforts to terminate tribal membership until 1974, appellants were enrolled members of Metlakatla within the meaning of the Alaska Native Claims Settlement Act and were properly excluded from enrollment under the Act.

APPEARANCES: Robert Blasco, Esq., for appellants Corinne Mae Howell, Gary Arnold Howell, Richard Dewayne Howell, and Darcy Lynn Howell; Bruce Schultheis, Esq., Anchorage Solicitor's Office, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Procedural and Factual Background

On May 1, 1980, appellants sought relief from a determination by an Administrative Law Judge in a disenrollment contest in which it was held they should be disenrolled as Alaska Natives under the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688 (hereafter ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (further references to U.S.C. are to 1976 and 1977 editions).

In 1942 appellant Corinne Mae Howell was born in Metlakatla, Alaska. In 1956 she moved to Sitka, Alaska, where she attended school, while at the same time, her parents moved to Oakland, California. In

1961 appellant joined her parents in California where she subsequently married. In 1963 following the birth of appellant Richard Dewayne Howell, appellant Corinne Mae Howell and her husband and son moved to Windsor, Missouri. In 1964 appellant Darcy Lynn Howell was born in Missouri. In 1966 the Howell family returned to Oakland where appellant Gary Arnold Howell was born in 1967. In September 1968 the family moved to Metlakatla, where they remained until December 1970, when they returned to Windsor, Missouri. In 1973 they again returned to Metlakatla where they remained until 1977. Thereafter, the family returned to Windsor, Missouri, where they now reside.

In 1968 while living at Metlakatla, appellant Corinne Mae Howell executed an instrument entitled "Application for Membership in Annette Islands Reserve," which recites in pertinent part:

Metlakatla, Alaska, Oct 28, 1968

COUNCIL OF ANNETTE ISLANDS RESERVE
Metlakatla, Alaska 99926

Gentlemen:

I am submitting herewith my application to become a member of Annette Islands Reserve and do subscribe to the following principals of good citizenship.

1.--To be faithful and loyal to the Government of the United States of America.

2.--To be loyal to the local government of our community, to obey its ordinances and regulations, and to obey the laws of the Territory of Alaska and the laws of the United States.

3.--To co-operate earnestly in all endeavors for the education of our children, for the advancement of the community, and in the suppression of all forms of vice.

Permit Granted 11/1/68
Rejected

Respectfully,

/s/ Corinne M. Howell

At a hearing held on September 25, 1979, on the contest initiated by the Bureau of Indian Affairs (BIA) to disenroll appellants, appellant Corinne Mae Howell explained the execution of the October 28, 1968, application:

> [T]hey told me I had to sign my name here [the application for membership] to get a card so I could have my rights on the Island.
>
> * * * * * *
>
> Q. Do you know what they meant by your rights on the Island?
>
> A. Just to go to the clinic and stuff like that, you know, where you don't have to pay for any medication.

(Tr. 34).

Appellant testified that she was "surprised" when her membership in the Metlakatla Indian Community was announced at a public dance and banquet which she attended in November 1968 in the community. However, she took no affirmative action to disavow membership in the community until 1974, when, having been enrolled for benefits under the ANCSA, she learned that her eligibility for benefits was in doubt. In a letter to the BIA dated December 2, 1974, she wrote:

> I hereby affirm that I am, and have been off and on a member of the Metlakatla Indian Community. I will show you later.
>
> Upon inquiring [of] Frida Damus on Nov. 5, 1974, 1 did not sign the affirmation of membership and DID NOT VOTE. That I gave up my voting rights, and membership, since I signed up with the Alaska Land Claims Settlement.
>
> So with this information in hand I hereby make intentions known in writing I intend to abandon my Community Membership in the Community of Metlakatla, Alaska and hereby request that my name be included on the Alaska Land Claims Settlement.

Appellant Corinne Mae Howell's application for enrollment under ANCSA shows her to be one-fourth Alaska Indian and five-eighths Tsimshian. Her children, appellants Gary Arnold, Richard Dewayne, and Darcy Lynn Howell are shown on their application for benefits to be one-eighth Alaska Indian and three-eighths Tsimshian. Mrs. Howell testified that she intended to take the Missouri residence of her husband from the time of her marriage, which took place in California, and considers Missouri to be her place of domicile.

The Administrative Law Judge below rejected appellant's contentions concerning community membership holding:

> Mrs. Howell did apply for membership in the Metlakatla Community. Whether or not she knew she was applying for membership, but thought she was only applying for health benefits, is immaterial because she was present on November 1, 1968, when her name was read as an approved member of the community, and by her silence, she ratified this action. Further, in her letter dated December 2, 1974, to the Enrollment Coordinating Office (Ex. 9), she stated, "I hereby affirm that I am, and have been off and on a member of the Metlakatla Indian Community." It was

not until November 5, 1974, that she did not affirm her membership, did not vote, and gave up her voting rights and membership in the community in order to qualify for enrollment under the Act.

Thus, Mrs. Howell was a member of the community as of April 1, 1970, and that date has been defined as the critical date to be enrolled in Metlakatla so as to be ineligible for enrollment under the Act. (25 CFR 43h.11)

(Decision at 5-6, dated April 17, 1980).

Discussion and Decision

The Metlakatla community is described by Cohen in the Handbook of Federal Indian Law, at 415 (1941):

Unique among native communities is that of the Metlakatla Indians. Encouraged by federal officials about 800 of these Indians migrated in 1887 to the Annette Islands in southeast Alaska from their homes in Metlakatla, British Columbia. A ruling of the Attorney General held that the President of the United States lacked authority to establish a reservation for these Indians on the public domain without congressional sanction, because they were aliens, born outside of the boundaries of the United States proper. By the Act of March 3, 1891, Congress created a reservation for the use of these immigrants and such other Alaskan natives as might join them, to be used in common under rules and regulations prescribed by the Secretary of the Interior. By the Act of March 4, 1907, Congress permitted these Indians to be licensed as masters, pilots, and engineers of steamboats and as operators of motor boats, as if citizens of the United States. Congress granted collective naturalization by the Act of May 7, 1934, to the Metlakahtlans and the Indians who emigrated from British Columbia not later than January 1, 1900, and resided continuously in Annette Island.

* * * * * *

The privilege of joining the Metlakahtlan community and occupying any part of the Island is subject to vote of

> the Metlakahtlan council. To obtain membership, except by birth, requires the approval of three-fourths of the members of the town council. The land and resources of the reservation are held in common; individuals occupy land by permits from the council. Local self-government is recognized in rules and regulations of the Secretary of the Interior. [Footnotes omitted.]

[1] The unique character of the Metlakatla community continues today. The Metlakatla Indian community retains the 1891 reserve in lieu of benefits under ANCSA. Accordingly, benefits under ANCSA are denied by section 19 of the Act, 43 U.S.C. § 1618(a), which recognizes an exception in the case of Metlakatla and provides:

> § 1618. Reservations; revocation; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations
>
> (a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

The declared purpose of ANCSA is to extinguish "all claims by Natives and Native groups of Alaska, based on aboriginal land claims" (43 U.S.C. § 1601(a)). The term "Native" may include persons who are Tsimshian Indians (Metlakahtlans), but only if those persons are not enrolled in the Metlakatla Indian community (43 U.S.C. § 1602(b)). The declared intent of Congress is to prevent duplication of benefits under

ANCSA and other statutes providing benefits to Indians either by way of allotment (43 U.S.C. § 1617) or reservation (43 U.S.C. § 1618). Thus the Administrative Law Judge correctly ruled that Congress planned "to prevent an Alaskan Native from receiving double benefits" (Decision at 5, dated April 17, 1980). It is clear on the face of the ANCSA that membership in the Metlakatla community precludes the receipt of benefits under ANCSA. Departmental regulations, which we are without authority to declare invalid, also make it clear, as the Administrative Law Judge noted, that any person enrolled in the Metlakatla community as of April 1, 1970, is ineligible for enrollment under ANCSA. See 25 CFR 43h.11. The issues on appeal are, therefore, reduced to whether appellant's renunciation of Metlakatla membership on December 2, 1974, as evidenced by her letter on that date, was effective to entitle her and her children to claim benefits under ANCSA. 1/

To reach a determination of appellants' eligibility to be enrolled for ANCSA benefits, the Administrative Law Judge applied 25 CFR 43h.11

1/ Appellants specify 25 exceptions to the Administrative Law Judge's ruling. Thus, they contend his ruling denied them due process and the equal protection of the law guaranteed by the Fifth Amendment to the United States Constitution, and that he erred by failing to follow binding Departmental precedent established by the disenrollment contest entitled United States v. Anderson, Docket No. AL 77-57D, decided Nov. 30, 1977. They contend that application of the legal doctrines of res judicata and collateral estoppel prevent their disenrollment and that the provisions of sections 3, 5, and 19 of ANCSA and 25 CFR Part 43h were misapplied by the finder of fact below. Finally, they contend that the Administrative Law Judge committed numerous errors in fact finding which affected the conclusions announced and resulted in an erroneous decision on the merits. However, the primary thrust of the arguments advanced by appellants as shown by the brief on appeal concerns whether the Administrative Law Judge correctly found that appellants' renunciation of Metlakatla community membership was effective to entitle them to benefits under ANCSA. The other specified errors are without merit.

to establish April 1, 1970, as the date eligibility criteria should be applied to determine individual entitlement to benefits. 2/ Appellants point out that ANCSA did not become law until December 18, 1971, and that the 1970 date used by the Departmental regulation appears to be merely the date of the 1970 census and bears no relation to the Act or a reasonable administration of the Congressional intentions to settle aboriginal claims. 3/ The regulation, 25 CFR 43h.11, provides: "No person who was enrolled in the Metlakatla Indian Community of the Annette Islands Reserve as of April 1, 1970, shall be eligible for enrollment under this Part [41 FR 32423, Aug. 3, 1976]."

Prior to the 1976 revision of the regulation, 25 CER 43h.11 read: "Applications from Native Alaska members of the Metlakatla Indian Community will be conditionally accepted subject to a determination of their eligibility for inclusion on the Alaska Native roll and entitlement to benefits under the Act." Before adoption, the current rule was published by the Department on June 4, 1976, with the comment (41 FR

2/ Even were the effective date of the Act used to determine eligibility, the result here would remain the same. In this connection, see United States v. Bowen, 8 IBIA 218, 88 I.D. 261 (1981).

3/ The clear intent of the Act is to exclude the Metlakatla community from benefits. This intent is also indicated by the legislative history of the Act. Thus, the report of the Secretary to the House concerning the House bill subsequently enacted states the following concerning the Metlakatla community:

"Section 16 provides that the existing reserves that have been set aside by any means for natives use or administration of their affairs are revoked when such revocation is not inconsistent with the provisions of this Act. This provision does not revoke the Annette Islands Reserve because the revoking of such reservation would be inconsistent with the provisions of this Act since the Tsimshian Indians are not included in the settlement made by this bill."
(H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 2, reprinted in [1971] U.S. Code Cong. & Ad. News 2219.)

22566), "A revision of § 43h.11 is proposed to more definitively reflect the status of persons enrolled in the Metlakatla Indian Community," indicating that the agency sought to implement the statutory directive that Tsimshian Indians benefiting from the Annette Islands Reserve be excluded from benefits under ANCSA.

Appellant Corinne Mae Howell contends she was neither a domiciliary or resident of the reserve on the effective date of the ANCSA, December 18, 1971, which date she urges should be used to determine eligibility in her case, rather than the April 1, 1970, date selected by the Departmental regulation. The record on appeal indicates appellant was born at Metlakatla and lived there until she left to attend school. Although not clearly stated in the record, it appears that she did not leave Alaska to join her family in California until some time after her completion of high school in 1961. From 1968 until 1970 she and her family lived in Metlakatla. In 1968 appellant made formal application for membership and was admitted to the Metlakatla community. Her family was with her again in Metlakatla from 1973 until 1977. During that time her husband held a job in the community and appellant cared for her grandparents who lived in Metlakatla. On March 27, 1973, meanwhile, while still at Metlakatla, she applied for benefits under ANCSA. The BIA, administering the Act under the pre-1976 regulation, accepted the application from appellant and her children. It was not until her application was questioned because of her membership in

Metlakatla that appellant took action to disassociate herself from the Tsimshian community. 4/

Under the circumstances, it is apparent that appellant accepted benefits under the 1891 statute creating the Annette Islands Reserve. 5/ She applied for, and was admitted to membership in the community after spending much of her life in residence in the community. Assuming for the purposes of decision that the 1976 revision of 25 CFR 43h.11 does not apply in her case, since her application and rejection predate the revision of the regulation, appellant is nonetheless made ineligible

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4/ Appellant points out several errors of fact in the findings of the Administrative Judge below. Thus, she correctly contends there is no showing that appellant voted in the election held in Metlakatla on Nov. 3, 1970. The decision below also incorrectly finds that all three minor children were born in California, a finding contradicted by a written submission by appellant indicating otherwise. The errors noted are not, however, substantial. Appellant's argument that the decision improperly characterized her Dec. 2, 1974, letter is incorrect. The minor factual discrepancies noted in the decision do not affect the correctness of the conclusions or the ultimate holding.

5/ Citing Resolution 74 adopted by the Metlakatla Indian community in 1974, appellant argues that considerations of residence or domicile are determinative of this appeal. This approach, while ingenious, ignores the statute which is the basis for the benefits sought. ANCSA is intended to settle claims based upon aboriginal occupancy. Metlakatla, a colony of Indians from British Columbia established in the late 19th century, is expressly excluded from the benefits provided by the Act. Membership in the colony excludes a share under ANCSA. Discussion of questions of residence or domicile is more confusing than beneficial to an understanding of individual claims by persons of Tsimshian ancestry for ANCSA benefits. (Resolution 74 denounces the receipt by Metlakatla members of ANCSA benefits and recommends the Secretary of the Interior disenroll Metlakatla members from the ANCSA rolls unless a member "abandon his membership in the Metlakatla Indian Community.") (Resolution 74, Metlakatla Indian community, June 24, 1974. The resolution makes no mention of residence requirements or domiciliary considerations.)

for benefits under ANCSA by reason of her membership in, and acceptance of benefits from, the Metlakatla community. 6/

Mrs. Howell's children born in 1963, 1964, and 1967 are presumed to be members of the Metlakatla community during their minority pursuant to the provisions of Article II, Section 3, Constitution and Bylaws of the Metlakatla Indian community. There is no showing in the record that any of the three children has been emancipated, nor does it appear that any of the three has disavowed membership in the community. Their eligibility to share in benefits under ANCSA was made to depend upon their mother's claims for, and participation in, the community. All three children were present with appellant in Metlakatla from 1968 until 1970 and again from 1973 until 1977 and shared in the benefits derived from

6/ 43 U.S.C. § 1618(a). Appellant contends that the Department is precluded from reaching this decision by the decision in United States v. Anderson, Docket No. AL 77-57D (1979), and that legal doctrines of stare decisis, res judicata and collateral estoppel should operate to prevent the result reached here. In Anderson an Administrative Law Judge in a disenrollment contest permitted enrollment of Tsimshian Indians who had at least one-quarter Indian ancestry other than Tsimshian without regard to their membership in the Metlakatla community. Such a position is, of course, a clear violation of 43 U.S.C. § 1618(a) and ignores the statutory definition of "Native" which excluded such persons from receiving dual benefits (43 U.S.C. § 1602(b)). Assuming, in the light most favorable to appellant, that the facts and issues in the Anderson case are identical to the matter before the Board, the situation on appeal is simply that of two conflicting administrative actions which require resolution by the agency following complete agency review. 43 CFR 4.1010. In no event could this Department, by following a construction of Departmental regulations which violates a statutory bar to enrollment, permit a prior erroneous decision to frustrate the intent of Congress to bar members of Metlakatla from receipt of ANCSA benefits. Both the Act and the implementing regulations are clearly intended to insure that multiplication of benefits does not occur. (To the extent that Anderson held Tsimshian ancestry is not a disqualifying bar to enrollment for otherwise qualified applicants, it is correct: such a finding is not inconsistent with the result here.)

the 1891 reserve. They have taken no independent action to renounce membership in the community, and to do so would have been difficult, given their family circumstances. The Administrative Law Judge correctly concluded that the appellant's minor children also are precluded from receipt of benefits under ANCSA.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. Appellants are barred from enrollment for benefits under the Act. 7/ Agency officials of the BIA charged with enforcement of Departmental regulations respecting enrollment are directed to take appropriate action to disenroll appellants consistent with this opinion, which is final for the Department.

Franklin D. Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

7/ Appellants rely upon a strained construction of 25 CFR 43h.15 to argue that a person may not be disenrolled for membership in Metlakatla once enrolled, since the regulation specifically enumerates only section 5, ANCSA, as a basis for disenrollment. Section 43h.15 does not permit such a strained construction. Membership in Metlakatla is clearly defined by the regulation as one of the disqualifying factors which require disenrollment. This argument (also traceable to the Anderson decision) is rejected. The language of the Act concerning residence is directed primarily to area assignment of beneficiaries and does not involve considerations of basic eligibility for benefits.